

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
JOSEPH IROM	:	DETERMINATION
		DTA NO. 819819
for Redetermination of a Deficiency or for Refund of New York State and New York City Personal Income Tax under Article 22 of the Tax Law and the Administrative Code of the City of New York for the Years 1997, 1998 and 1999.	:	

Petitioner, Joseph Irom, 12 Apaucuck Cove Lane, Westhampton, New York 11977, filed a petition for redetermination of a deficiency or for refund of New York State and New York City personal income tax under Article 22 of the Tax Law and the Administrative Code of the City of New York for the years 1997, 1998 and 1999.

A hearing was held before Timothy J. Alston, Administrative Law Judge, at the offices of the Division of Tax Appeals, 641 Lexington Avenue, New York, New York, on October 19, 2004 at 10:30 A.M., with all briefs submitted by February 4, 2005, which date began the six-month period for the issuance of this determination. Petitioner appeared *pro se*. The Division of Taxation appeared by Christopher C. O'Brien, Esq. (Peter B. Ostwald, Esq., of counsel).

ISSUES

I. Whether petitioner has shown that he was not present in New York City for more than 183 days during 1997, 1998 and 1999 and therefore not taxable as a resident individual for those years pursuant to Tax Law § 605(b)(1)(B) and New York City Administrative Code § 11-1705(b)(1)(B).

II. Whether petitioner has shown that he was not domiciled in New York City during 1997, 1998 and 1999 and therefore not subject to tax as a resident individual pursuant to Tax Law § 605(b)(1)(A) and New York City Administrative Code § 11-1705(b)(1)(A).

III. Whether petitioner has shown that penalties imposed herein pursuant to Tax Law § 685(b) and (p) should be abated.

FINDINGS OF FACT

1. On March 25, 2002, following an audit, the Division of Taxation (“Division”) issued to petitioner, Joseph Irom, a Notice of Deficiency which asserted additional New York City personal income tax due for the years 1997, 1998 and 1999 as follows:

<u>1997</u>	<u>1998</u>	<u>1999</u>
\$49,207.59	\$7,012.80	\$35,131.69

2. The Notice of Deficiency also asserted interest and penalties for negligence and substantial understatement of tax pursuant to Tax Law § 685(b) and (p) for each of the years at issue.

3. The deficiency resulted from the Division’s conclusion that petitioner was properly subject to tax as a resident of New York State and City for the years 1997, 1998 and 1999.

4. At hearing, petitioner conceded that he lacked the proof necessary to establish that he was not subject to tax as a resident of New York City for 1997 and thus conceded the Division’s assertion of additional tax due with respect to that year.

5. Since 1982, petitioner has leased an apartment at 211 East 70th Street, New York, New York (“the apartment”). The apartment has about 1,200 square feet of living space. Prior to July 1, 1995, the apartment was rent-regulated.

6. Petitioner entered into a three-year lease for the apartment commencing July 1, 1995. Petitioner's spouse, Annette Kolman, was added to the lease when petitioner and Ms. Kolman entered into a three-year lease extension agreement commencing July 1, 1998.

7. Rental on the apartment was \$3,000 per month during 1997 and through June 1998 and \$3,135 from July 1998 through 1999.

8. In 1988, petitioner and Ms. Kolman purchased a home at 12 Apaucuck Cove Lane, Westhampton, New York ("the Westhampton home") for a purchase price of \$645,000.00. The Westhampton home had a swimming pool and tennis court. Over the years, petitioner and Ms. Kolman have made improvements to the property, and during the years at issue, the home consisted of about 4,500 square feet of living space.

9. Petitioner enjoyed a long career as an attorney. Beginning in about 1961, he practiced law in the Bronx, New York in partnership with Milton Wittels. In 1992, petitioner and Mr. Wittels converted their partnership into a professional corporation, Irom & Wittels, P.C., and continued their practice in the Bronx.

10. Petitioner continued to actively practice law through 1997, earning \$893,100.00 in salary from the firm during that year.

11. As of January 1, 1998, petitioner, then 68 years of age, retired from the firm, then known as Irom Wittels & Freund, P.C. Pursuant to an agreement among the stockholders of the firm, upon his retirement, petitioner was entitled to receive "in consideration of the services he has heretofore rendered" an amount equal to 20 percent of the firm's net fees for the first year following retirement, 15 percent of such fees for the second year following retirement, and 10 percent of such fees for the third and fourth years following retirement.

12. On his 1998 New York return, petitioner reported \$82,317.00 in "other income" from the firm. Petitioner allocated \$76,020.00 of such other income to New York City as nonresident

earnings from self-employment. Petitioner also reported a long-term capital gain of \$50,903.00 on the sale of Irom Wittels treasury stock.

13. On his 1999 New York return, petitioner reported \$230,257.00 in other income from Irom Wittels and allocated \$106,321.00 of such other income to New York City as nonresident earnings from self-employment. Petitioner also reported \$460,513.00 in long-term capital gain on the sale of Irom Wittels treasury stock.

14. Petitioner's income from the firm and from the sale of treasury stock in 1998 and 1999 relates to services previously rendered and not to any work performed for the firm in 1998 or 1999.

15. Petitioner and Ms. Kolman were married in 1991. Petitioner has two adult children from a previous marriage. During the years at issue, one of petitioner's children resided in New York City and one in California. Ms. Kolman also has two adult children from a prior marriage, a son who lived in New York City during the period at issue and a daughter who lived in Roslyn, Suffolk County, New York. Roslyn is located approximately 45 minutes from the Westhampton home.

16. Petitioner registered to vote in Westhampton effective April 1998. Upon renewal in 1998, petitioner's New York driver's license listed his Westhampton address.

17. During the years at issue, many of petitioner's bills and other correspondence were addressed to him and or his spouse at the apartment. Specifically, phone bills for both the apartment and the Westhampton home, American Express statements, Citibank credit card statements, bank statements, and statements for the Westhampton Tennis & Sport Club were mailed to the apartment. Electric and heating oil bills for the Westhampton home were also mailed to the New York City address.

18. Petitioner regularly used Fantastic Cleaners, East 69th Street, New York City for his dry cleaning during the years at issue. He continued to see his longtime physician, also located in the City, during the years at issue. In addition, petitioner maintained a parking space at the East 71st Street Garage Co., New York City during the years at issue.

19. Following his retirement from the law firm petitioner had no active business interests in New York City. Petitioner did continue to participate in certain New York-based partnerships as passive investments. Specifically, petitioner invested in Sage Opportunity Fund, a hedge fund, and 341-363 West 50th Street Redevelopment, a real estate investment.

20. Petitioner's returns for 1997, 1998 and 1999 listed his Westhampton address as his permanent home address within New York State. For each of those years petitioner also filed a City of New York Nonresident Earnings Tax Return (NYC-203). On each such NYC-203, petitioner reported that he did not maintain an apartment or other living quarters in the City of New York for any part of the year. Petitioner also reported on such returns that he was not a resident of the City of New York for any part of the year.

21. Petitioner's home in Westhampton is approximately 90 miles from his New York City apartment. Driving time for this trip ranges from two to four hours depending on traffic conditions. Traffic is particularly heavy on this route during the summer.

22. Prior to the years at issue, and since 1982, petitioner filed his New York returns as a resident of the City of New York using the apartment's address.

23. Ms. Kolman, also an attorney, filed her New York returns as a New York City resident until 1998. Ms. Kolman continued to practice law following petitioner's retirement.

24. Petitioner and Ms. Kolman filed separate returns during the period at issue.

25. Petitioner traveled extensively during the years at issue. In 1999, he was outside the State traveling 61 days, visiting such places as China, Egypt, Hawaii, and Puerto Rico. In 1998,

petitioner spent about 59 days traveling out of State and in 1997, petitioner spent about 55 days traveling out of State.

26. In addition to other days he may have used the Westhampton home, petitioner often spent weekends during the years at issue at the Westhampton home.

27. In its audit for 1997, the Division determined 170 documented days in New York City, 37 undocumented days, and 158 documented days outside New York City. The Division deemed the undocumented days to be New York City days and thus determined 207 New York City days and 158 days outside New York City for 1997. As noted previously, petitioner conceded that he lacked the proof necessary to show that he was not taxable as a resident for 1997. He offered no proof regarding his whereabouts on specific days in 1997.

28. In its audit for 1998, the Division determined 164 documented days in New York City, 36 undocumented days, and 165 documented days outside New York City. The Division deemed the undocumented days to be New York City days and thus determined 200 New York City days and 165 days outside New York City for 1998.

29. For 1999, the Division determined 140 documented days in New York City, 45 undocumented days, and 180 documented days outside New York City. The Division deemed the undocumented days to be New York City days and thus determined 185 New York City days and 180 days outside New York City for 1999.

30. Petitioner challenged the Division's conclusions with respect to certain days in 1998. The following is a list of such days¹ and a summary of the evidence in the record regarding petitioner's whereabouts on such days:

¹ Petitioner's list of contested days in 1998 included September 21, which the Division conceded on audit to be a day outside the city. September 21 is therefore not included on this list.

January 5. Petitioner departed from Hong Kong on January 4, 1998. Petitioner's passport bears a U.S. immigration stamp indicating entry at New York, New York on January 5, 1998. Phone records show a phone call from petitioner's New York City apartment on this date.

January 11. There is an American Express charge in Roslyn, New York on January 11. January 10 is conceded by the Division as a non-New York City day. January 12 is conceded by petitioner as New York City day.

January 23. The Division's audit workpapers show a Westhampton American Express charge for dinner on January 23. Petitioner's phone bills show a call from the apartment at 10:43 P.M. on January 22.

January 30. Audit workpapers show a credit card receipt for dinner in Westhampton on January 30. Petitioner's phone bills show a call from the apartment at 10:33 P.M. on January 29.

February 1. Petitioner's phone bills reveal a call from Westhampton at 9:13 A.M. and a call from the apartment at 7:34 A.M. on February 2.

February 6. Petitioner departed from JFK Airport on a trip to Mexico. Petitioner's phone bills show calls from the apartment during the afternoon of February 5. February 2 through 5 are conceded by petitioner to be New York City days.

February 14 and 15. There is no documentation in the record as to petitioner's location on these two days. February 15 is petitioner's birthday and he testified that he had a dinner celebrating his birthday with his family in Westhampton. February 16, President's Day, is conceded by petitioner as a New York City day.

February 27. Records indicate a charge for a tennis lesson at the Westhampton Tennis & Sport Club. Petitioner's credit card records show a purchase at Ace Beauty Supply, Bayside, Queens, New York and a purchase in Westhampton.

March 1. Petitioner's American Express records show a charge in Roslyn, New York.

March 20. The auditor's workpapers show credit card charges in California. Petitioner was en route to Polynesia for a vacation, where he arrived on March 21. It is unclear from the record when petitioner departed from New York.

April 10. Phone records show evening calls from the Westhampton home. Credit card records show charges in Westhampton and New York City.

April 12. Phone records show a call from the Westhampton home at 2:41 P.M. Petitioner incurred a charge for tennis in Westhampton. American Express records show a charge in New Hyde Park, Nassau County, New York. Monday April 13 was conceded by petitioner on audit to be a New York City day.

April 17. Credit card records show a charge in Westbury, Nassau County, New York. There is also a charge for tennis in Westhampton.

April 19. Phone records show a call from the Westhampton house at 1:30 P.M. on this day, a Sunday, which was conceded by petitioner as a New York City day on audit. April 18 was conceded by the Division as a Westhampton day.

April 26. Phone records show a call from the Westhampton house at 9:32 A.M. There is a charge for tennis in Westhampton. There are credit card charges in both Westhampton and New York City.

April 27. There is a Long Island credit card charge.

May 9 and May 10. Both days are undocumented. This was Mother's Day weekend. Petitioner testified that it was customary for him to celebrate Mother's Day with his family in Westhampton.

May 17 and 18. Both days are undocumented. Petitioner asserts that he spent every weekend in May in Westhampton.

June 22. There is a New York City credit card charge. Petitioner claimed in his brief that there were credit card charges on this date in Southhampton and Bohemia, Suffolk County, but a review of the record reveals no such charges for this date.

July 13. Credit card records show a Hicksville, Suffolk County, credit card charge. Petitioner asserts a charge at the same location on the next day, but such assertion is unsupported by the record.

July 20. There is a credit card charge in Roslyn Heights, New York. There are two phone calls from the Westhampton house ending at about noon. Petitioner's claims of credit card charges in Westhampton and South Hampton on this date are unsupported by the record.

August 16. There is a credit card charge at a gas station in Woodbridge, New Jersey.

August 31. There are credit card charges in Las Vegas, Nevada. Phone records show a September 1 collect call from Alaska to the apartment.

September 3. There is a credit card charge in Alaska. Petitioner refers to credit card charges in Westhampton on this date which are not in the record.

September 4. There is a charge for tennis at Westhampton Tennis & Sport Club. September 4 was a Friday and the start of the Labor Day weekend.

September 7. Phone records show a call from the Westhampton house at 10:40 A.M. September 7 was Labor Day. Petitioner testified that he would not have traveled back to the city on this day because of the heavy traffic conditions.

September 11. There are credit card charges in California for car rental commencing this date.

September 19. There is a credit card charge at Ojai Valley Inn, Ojai, California.

September 20. September 20 is undocumented. A September 21 credit card charge for the Ritz Carlton in California shows a departure date of September 20. A September 23 credit card charge for the same hotel shows a departure date of September 22.

October 3. October 2, a Friday, was conceded by the Division as a Westhampton day. There is a charge for dinner in Westhampton on October 2. Petitioner refers to an October 3 credit card charge in Bohemia, Suffolk County, but such charge is not in the record.

October 8 - October 13. Petitioner's spouse traveled to Paris from JFK on October 7 and returned on October 14. Petitioner testified that he was in Westhampton while his wife was in Paris.

October 25. Phone records show a call from the Westhampton home at 10:16 A.M. Credit card records show a purchase from a New York City vendor.

December 6. Petitioner departed for Miami from JFK Airport. Credit card records show a charge for beauty supplies in New York City. Petitioner refers to a credit card charge in Westhampton on December 6, but such charge is not in the record.

31. Petitioner challenged the Division's conclusions with respect to certain days in 1999. The following is a list of such days² and a summary of the evidence in the record regarding petitioner's location on such days:

March 6. A travel agency-prepared trip itinerary shows that petitioner departed JFK for Cairo, Egypt on March 5.

March 13. The same itinerary shows that petitioner returned from Egypt to JFK on March 14.

² Petitioner's list of contested days in 1999 included December 19, which the Division conceded on audit to be a day outside the city. December 19 is therefore not included on this list.

April 3. Phone records show eight calls from the Westhampton home between 9:00 A.M. and 8:30 P.M. on Saturday, April 3. The Division determined on audit that April 2 was a Westhampton day. Phone records show three calls on April 4 from the Westhampton home between 10:00 A.M. and 2:00 P.M.

April 4. April 4 was Easter Sunday. As noted, phone records show three calls on April 4 from the Westhampton home between 10:00 A.M. and 2:00 P.M. There were two calls on April 5 at 8:43 and 8:47 P.M. Credit card records show a charge for a New York City restaurant on April 5.

April 18. Credit card records show a charge for a restaurant in Roslyn, New York. There were numerous phone calls from the Westhampton home between 11:00 A.M. and 6:30 P.M. on April 18 and two calls from the Westhampton home after 8:00 P.M. on April 19.

May 7 through May 10. Petitioner returned from a trip to China on May 6. There was a charge for a tennis lesson at Westhampton Tennis and Sport Club on May 7. Phone records show 13 phone calls from the Westhampton home on May 7 starting at 2:20 P.M. and ending at 7:14 P.M.; 5 phone calls from Westhampton on May 8 starting at 6:26 P.M. and ending at 7:11 P.M.; and 10 telephone calls from Westhampton on May 9, which was Mother's Day, starting at 9:03 A.M. and ending at 7:30 P.M. Petitioner testified that Mother's Day was usually celebrated with family dinner in Westhampton. There were six phone calls from Westhampton on Monday, May 10, starting at 5:35 P.M. and ending at 7:15 P.M. Petitioner's credit card records show restaurant charges in Flushing, Queens on May 9 and in New York City on May 10.

June 20. The record shows eight phone calls from Westhampton starting at 12:14 P.M. and ending at 9:00 P.M. Saturday, June 19 was conceded by the Division to be a Westhampton day. There was one call from Westhampton on June 21 at 2:14 P.M., which petitioner conceded was a New York City day. There was also a New York City credit card charge on June 21.

July 26. Phone records show 17 phone calls from Westhampton starting at 10:35 A.M. and ending at 9:17 P.M. On Sunday, July 25, determined on audit to be a non-New York City day, there were five calls from the Westhampton home starting at 8:20 A.M. and ending at 5:58 P.M. On July 27, conceded by petitioner to be a New York City day, there were nine call from the Westhampton home starting at 3:30 P.M. and ending at 6:49 P.M.

August 1 and August 2. Saturday, July 31 was determined a non-New York City day by the Division on audit. Phone records show 10 phone calls from Westhampton on Sunday, August 1 starting at 10:50 A.M. and ending at 6:53 P.M. On July 31, determined on audit to be a non-New York City day, there were 17 calls from the Westhampton home starting at 7:49 A.M. and ending at 6:36 P.M. On August 2, there were 14 calls from the Westhampton home starting at 10:59 A.M. and ending at 4:05 P.M. On August 3, a non-New York City day as determined on audit, there were six calls from the Westhampton home.

August 19. On August 19 there were six phone calls from Westhampton starting at 12:27 P.M. and ending at 3:01 P.M. Friday, August 20 was determined by the Division on audit to be a non-New York City day and there were phone calls from the Westhampton home starting at 11:36 A.M. On Wednesday, August 18, conceded by petitioner to be a New York City day, there were five calls from the Westhampton home starting at 5:31 P.M. and ending at 7:23 P.M.

August 23. Phone records indicate 13 calls from the Westhampton home starting at 10:37 A.M. and ending at 4:29 P.M. Sunday, August 22 was determined on audit to be a non-New York City day. On August 24, conceded by petitioner as a New York City day, there were nine calls from the Westhampton home starting at 12:31 P.M. and ending at 2:02 P.M.

September 6 and 7. Sunday, September 5 was determined on audit to be a non-New York City day. On September 6, Labor Day, there were 19 calls from the Westhampton home starting at 7:56 A.M. and ending at 6:00 P.M. On September 7, there were eight calls from the

Westhampton home starting at 3:17 P.M. and ending at 7:22 P.M. Also on September 7, credit card records indicate a credit card charge to a New York City restaurant. There were three New York City credit card charges on September 8.

October 2. According to the Division's audit workpapers, petitioner returned from a trip to Italy via JFK airport on October 1. There were 10 calls from the Westhampton home on Saturday, October 2 starting at 8:46 A.M. and ending at 12:27 P.M. There were also 10 calls from Westhampton on Sunday, October 3 starting at 8:55 A.M.

October 8. Phone records indicate seven phone calls from the Westhampton home on Friday, October 8 beginning at 4:29 A.M. and ending at 3:42 P.M. There is also a charge for a tennis lesson at Westhampton Tennis and Sport Club on October 8. Petitioner specifically recalled this date and the early morning phone call because he and three friends went fishing near Montauk, New York. Phone records also show eight phone calls from the Westhampton home on Saturday, October 9 starting at 8:26 A.M. There is a credit card charge for a restaurant in Greenwich, Connecticut on October 7.

October 17. Saturday, October 16 was determined on audit to be a non-New York City day. There was a call from the Westhampton home at 8:33 A.M. on October 17. There were two calls from the Westhampton home on October 18 (determined on audit to be a New York City day) beginning at 11:45 A.M.

December 18. On Friday, December 17, phone records show two calls from the Westhampton home, at 11:49 A.M. and 12:04 P.M. On Saturday, December 18, there were 22 phone calls from the Westhampton home starting at 8:02 A.M. and ending at 7:41 P.M. Phone records show six calls from Westhampton on Sunday December 19 starting at 10:19 AM and ending at 2:28 P.M. Petitioner's American Express records show a departure from a hotel in Hawaii on December 17; a restaurant charge on December 17 in Roslyn Heights, New York; and

a charge for gasoline in Ronkonkoma, New York on December 19. The Division determined December 19 to be a non-New York City day.

32. As evidence of his whereabouts on specific days in 1999, petitioner submitted in evidence a detailed printout of calls made from his Westhampton home. Petitioner obtained such records from the phone company. Petitioner did not provide similar phone records for 1998.

33. The phone company records provided by petitioner for 1999 show phone calls from the Westhampton home on several days conceded by petitioner to be New York City days.

34. Contrary to Division claims, there is no evidence in the record of calls from the New York City apartment and the Westhampton house on the same day.

CONCLUSIONS OF LAW

A. Section 11-1701 of the New York City Administrative Code imposes a tax on the city taxable income of every “city resident individual.” As relevant herein, section 11-1705(b)(1) of the New York City Administrative Code defines “city resident individual” as someone:

(A) who is domiciled in this city, or . . .

(B) who is not domiciled in this city but maintains a permanent place of abode in this city and spends in the aggregate more than one hundred eighty-three days of the taxable year in this city, unless such individual is in active service in the armed forces of the United States.

B. Addressing the second prong of the residency test (Administrative Code § 11-1705 [b][1][B]), so-called “statutory residency,” petitioner had the burden of proving by clear and convincing evidence that he was not present in New York City for more than 183 days during the years remaining at issue (*see, Matter of Kornblum v. Tax Appeals Tribunal*, 194 AD2d 882, 599 NYS2d 158; *Matter of Smith v. State Tax Commn.*, 68 AD2d 993, 414 NYS2d 803).

Specifically, pursuant to the Division's regulations,³ an individual, like petitioner, who claims a domicile outside the city but who maintains a permanent place of abode within the city, "must keep and have available for examination . . . adequate records to substantiate the fact that such person did not spend more than 183 days . . . within [the city]" (20 NYCRR 105.20[c]).

Moreover, for purposes of counting the number of days, presence within the city for any part of a calendar day generally constitutes a day within the city (*see*, 20 NYCRR 105.20[c]; *Matter of Leach v. Chu*, 150 AD2d 842, 540 NYS2d 596, *appeal dismissed* 74 NY2d 839, 546 NYS2d 344).

C. In making a determination in this matter on the question of statutory residency, I find that the testimony of petitioner and his spouse regarding his location on certain specific dates, e.g., birthdays, Mother's Day, is insufficient, without contemporaneous or third-party corroboration, to establish such dates as days outside New York City. Given the close proximity between the apartment and the Westhampton home, petitioner's frequent travel between his two residences, and taking into account the passage of time from the years at issue to the hearing, I am unconvinced that either petitioner or his spouse can accurately recall such details.

Similarly, the testimony of petitioner and Ms. Kolman as to petitioner's general pattern of use of the Westhampton home fails to establish his whereabouts on any particular day during 1998 or 1999. Specifically, petitioner testified that during 1998 and 1999 he generally traveled to the Westhampton home on Friday and returned on Monday or Tuesday. While the record certainly shows that petitioner often spent weekends in Westhampton (*see*, Finding of Fact "26") and made regular use of the Westhampton home in those years, given the factors of proximity

³ The Division's regulations with respect to the New York State income tax imposed by Article 22 of the Tax Law are applicable in their entirety to the income taxes imposed by the City of New York pursuant to Article 30 of the Tax Law and the New York City Administrative Code, and any reference in such regulations to "New York State domicile, resident and nonresident shall apply in like manner to City of New York domicile, resident and nonresident by substituting City of New York for New York State wherever applicable" (*see*, 20 NYCRR 290.2).

and frequent travel noted above; the passage of time from the years at issue to the hearing; and, considering that, pursuant to 20 NYCRR 105.20(c), any part of a day in the city must be deemed a city day, such testimony is insufficient, without corroboration, to establish any such days as days outside the city.

Having discounted the testimonial evidence, the best evidence remaining in the record regarding petitioner's day-to-day whereabouts in 1998 and 1999 is documentary evidence submitted to the Division during the course of the audit and at hearing, which consists, in large part, of credit card records and phone records of the Westhampton home and the apartment. Such evidence forms the basis for my determination on the statutory residency issue. Obviously, such evidence is far from flawless. Both petitioner and Ms. Kolman had access to the telephones at both the apartment and the Westhampton home. As to the credit card records, such records list the location of the seller; the purchaser is not necessarily physically present at the seller's location. Notwithstanding these flaws, given the lack of other credible evidence in the record regarding petitioner's day-to-day whereabouts, the telephone and credit card records are the best evidence in the record on this issue.

D. Upon review of the days disputed by petitioner for 1998, I find that petitioner has failed to meet his burden of proof to show that he was not present in New York City for more than 183 days. Accordingly, the Division's determination that petitioner was subject to tax as a statutory resident in 1998 was proper.

The following contested days in 1998 show evidence of New York City activity through either a credit card charge or a phone call from the apartment and are therefore properly deemed New York City days: January 5, January 23, January 30, February 1, February 27, April 10, April 26, June 22, October 25, and December 6. For several of these days, there are charges or phone records indicating activity at more than one location, e.g., Westhampton and the

apartment. Given the burden of proof, however, and the requirement that any part of a day in the city must be deemed a city day (*see*, 20 NYCRR 105.20[c]), all days showing a New York City charge or phone call are properly deemed New York City days.

The record contains no documentation with respect to the following contested days which, given petitioner's burden of proof, are properly deemed New York City days: February 14, February 15, May 9, May 10, May 17, May 18, October 3, and October 8 through October 13.

The following contested days show no credit card purchases or phone calls in either New York City or Westhampton, but do show credit card purchases in locations on Long Island and, on one day, New Jersey: January 11, March 1, April 12, April 17, April 27, July 13, July 20, and August 16. Some of these days also indicate charges or phone calls in Westhampton. Several of these days show charges in Roslyn, New York, where Ms. Kolman's daughter resides. Given the close proximity of such Long Island and New Jersey locations to New York City and the lack of evidence that petitioner either stayed overnight in any of these locations or did not visit these locations while traveling from or to the city, such days are properly deemed days in New York City.

Three days raise questions regarding when petitioner departed or returned to New York on vacations. On February 6 petitioner departed from JFK airport for a trip to Mexico. As there is no evidence that petitioner was in Westhampton prior to such departure, this day is deemed a New York City day. March 20 shows credit card charges in California incurred while petitioner was en route to Polynesia. The record does not show when petitioner departed New York. In the absence of such evidence, it is concluded that petitioner departed on March 20 and this day is deemed a New York City day. With respect to September 20, credit card records are contradictory, indicating departure dates from a California hotel of September 20 and September 22. Since there is a credit card charge for September 21 in Westhampton, it is concluded that

petitioner returned to New York on September 20. As there is no evidence to the contrary, i.e., that petitioner was in Westhampton, September 20 is deemed a New York City day.

Petitioner has established that he was not present in New York City on the following days: April 19, August 31, September 3, September 4, September 7, September 11, and September 19. Adding these days to the 165 days outside New York City as determined on audit results in 172 days outside New York City and a corresponding 193 New York City days. Petitioner was thus a statutory resident of New York City for 1998.

E. Upon review of the days disputed by petitioner for 1999, I find that petitioner submitted sufficient proof to establish that he was not present in New York City for more than 183 days during that year. Accordingly, petitioner was not subject to tax as a statutory resident in 1999.

The travel agency trip itinerary shows that petitioner was in Egypt and was therefore not present in New York City on March 6 and March 13. Additionally, a review of the detailed printout of calls from the Westhampton home together with other evidence in the record establishes that petitioner was not present in New York City and was in fact present in Westhampton on the following days: April 3, May 8, August 1, August 2, September 6, and October 8. The record shows numerous telephone calls from the Westhampton home on each of these days. Further, except for October 8, the record shows significant Westhampton activity (thereby indicating petitioner's presence) on both the days preceding and the days following these specific days. With respect to October 8, the unique fact of a 4:29 A.M. phone call, along with other activity on October 8, and activity on October 9, compels the conclusion that petitioner was in Westhampton on this day.

Adding the eight days discussed above to the 180 days outside New York City as determined on audit results in 188 days outside New York City and a corresponding 177 New York City days. Petitioner was thus not a statutory resident of New York City for 1999.

F. Turning to the domicile issue, the Division's regulations define "domicile" in relevant part as follows:

(1) Domicile, in general, is the place which an individual intends to be such individual's permanent home - - the place to which such individual intends to return whenever such individual may be absent.

(2) A domicile once established continues until the individual in question moves to a new location with the bona fide intention of making such individual's fixed and permanent home there. No change of domicile results from a removal to a new location if the intention is to remain there only for a limited time; this rule applies even though the individual may have sold or disposed of such individual's former home. The burden is upon any person asserting a change of domicile to show that the necessary intention existed. In determining an individual's intention in this regard, such individual's declarations will be given due weight, but they will not be conclusive if they are contradicted by such individual's conduct. The fact that a person registers and votes in one place is important but not necessarily conclusive, especially if the facts indicated that such individual did this merely to escape taxation.

* * *

(4) A person can have only one domicile. If such person has two or more homes, such person's domicile is the one which such person regards and uses as such person's permanent home. In determining such person's intentions in this matter, the length of time customarily spent at each location is important but not necessarily conclusive . . . (20 NYCRR 105.20[d]).

G. It is well established that an existing domicile continues until a new one is acquired and the party alleging the change bears the burden to prove, by clear and convincing evidence, a change in domicile (*see, Matter of Bodfish v. Gallman*, 50 AD2d 457, 378 NYS2d 138). Whether there has been a change of domicile is a question "of fact rather than law, and it frequently depends upon a variety of circumstances which differ as widely as the peculiarities of individuals" (*Matter of Newcomb's Estate*, 192 NY 238, 250). The test of intent with regard to

a purported new domicile is “whether the place of habitation is the permanent home of a person, with the range of sentiment, feeling and permanent association with it” (*Matter of Bourne*, 181 Misc 238, 41 NYS2d 336, 343, *affd* 267 App Div 876, 47 NYS2d 134, *affd* 293 NY 785); *see also, Matter of Bodfish v. Gallman, supra*). While certain declarations may evidence a change in domicile, such declarations are less persuasive than informal acts which demonstrate an individual’s “general habit of life” (*Matter of Silverman*, Tax Appeals Tribunal, June 8, 1989, *citing Matter of Trowbridge*, 266 NY 283, 289).

H. While the standard is subjective, the courts and the Tax Appeals Tribunal have consistently looked to certain objective criteria to determine whether a taxpayer’s general habits of living demonstrate a change of domicile. “The taxpayer must prove his subjective intent based upon the objective manifestation of that intent displayed through his conduct” (*Matter of Simon*, Tax Appeals Tribunal, March 2, 1989). Among the factors that have been considered are: (1) the retention of a permanent place of abode in New York (*see, e.g., Gray v. Tax Appeals Tribunal*, 235 AD2d 641, 651 NYS2d 740 *confirming Matter of Gray*, Tax Appeals Tribunal, May 25, 1995; *Matter of Silverman, supra*); (2) the location of business activity (*Matter of Erdman*, Tax Appeals Tribunal, April 6, 1995; *Matter of Angelico*, Tax Appeals Tribunal, March 31, 1994); (3) the location of family ties (*Matter of Gray, supra; Matter of Buzzard*, Tax Appeals Tribunal, February 18, 1993, *confirmed* 205 AD2d 852, 613 NYS2d 294); (4) the location of social and community ties (*Matter of Getz*, Tax Appeals Tribunal, June 10, 1993); and (5) formal declarations of domicile (*Matter of Trowbridge, supra; Matter of Gray, supra; Matter of Getz, supra*).

I. Upon review of the entire record and pursuant to the foregoing standards, I find that petitioner failed to meet his burden of proof and has thus failed to prove, by clear and convincing

evidence, that he gave up his New York City domicile and acquired a domicile in Westhampton, New York as of the years at issue

As might be expected where a taxpayer maintains residences located within 90 miles of one another, petitioner made significant use of both the apartment and the Westhampton home during the years at issue. Accordingly, while there are facts in the record supportive of a change of domicile to Westhampton, the more salient facts in the record indicate that petitioner did not give up his New York City domicile.

As noted above, the retention of a permanent place of abode in the location of the historic domicile is a factor in the consideration of the domicile issue (*see, Matter of Gray v. Tax Appeals Tribunal, supra*). Here, petitioner continued to maintain and make frequent use of the apartment where he had resided since 1982. Further, where an individual has two homes, the length of time spent at each location is an important fact to be considered in determining domicile (*see, 20 NYCRR 105.20[d][4]*). Here, the record shows that petitioner spent more time in New York City than Westhampton by a considerable margin. Specifically, petitioner spent 193 days and 177 days in New York City in 1998 and 1999, respectively. In contrast, after allowing for days spent traveling outside New York State (*see, Finding of Fact “25”*), the record shows he was in Westhampton, at best, for approximately 113 days in 1998 and 127 days in 1999. Petitioner’s days in the city as compared with his days in Westhampton thus do not support a finding that his “general habit of life” was centered in Westhampton during the years at issue (*Matter of Silverman, supra, citing Matter of Trowbridge, supra*). Additionally, although less significant, petitioner’s use of the apartment address for virtually all of his significant bills, including utility bills for the Westhampton home; his continuing use of his New York City doctor; and his frequent use of a New York City dry cleaner supports the conclusion that he retained his New York City domicile.

Taken together these facts and circumstances suggest that petitioner lacked the intent “to give up the old and take up the new place as [his] domicile” (*Matter of Newcomb’s Estate, supra*, 192 NY at 250).

Petitioner’s retirement from the law firm effective January 1, 1998 would seem to be a factor in support of his position. Such retirement severed all active business ties to the city, an important indication of domicile (*see, Matter of Angelico, supra*). The significance of this factor is diminished, however, by the very modest change in the number of days spent in New York City from the last year of petitioner’s employment with the law firm, 1997 (207 New York City days), through 1998 (193 New York City days) and 1999 (177 New York City days). Such a modest change in the number of days spent in the city does not suggest that petitioner gave up his historic New York City domicile and acquired a new domicile in Westhampton.

As noted, there are facts in the record supportive of petitioner’s position. Petitioner’s ownership interest in the Westhampton home as compared with his leasehold interest in the apartment tends to support a finding of a Westhampton domicile (*cf., Matter of Zapka*, Tax Appeals Tribunal, June 22, 1989 [where a leased Florida residence versus ownership of a New York residence contributed to a finding of a New York domicile]). Additionally, the Westhampton home was much larger than the apartment, and the value of the Westhampton home was not insubstantial, having been purchased in 1988 for \$645,000.00. Also supportive of petitioner’s change of domicile to Westhampton are his voter registration and change in his driver’s license, although such formal declarations are less persuasive than the informal acts demonstrating an individual’s “general habit of life” (*see, Matter of Silverman, supra*).

The facts supporting petitioner’s position are offset by other facts in the record, discussed above, which indicate that petitioner retained his New York City domicile. Furthermore, considering petitioner’s City of New York Nonresident Earnings Tax Returns filed for each of the years at issue by which he wrongly reported that he did not maintain an apartment

in New York City during those years, I did not find credible petitioner's testimony regarding his intent to make the Westhampton home his domicile upon his retirement. Accordingly, I conclude that petitioner retained his New York City domicile for the years at issue.

J. The subject Notice of Deficiency asserts penalties pursuant to Tax Law § 685(b) and (p). Tax Law § 685(b) provides for the imposition of penalties if any part of a deficiency is due to negligence or intentional disregard of Article 22 or the regulations promulgated thereunder. Tax Law § 685(p) provides for the imposition of a penalty where there is a "substantial understatement" of the amount of income tax required to be shown on a return. Such penalty may be waived upon a showing of reasonable cause for the understatement and that the taxpayer acted in good faith.

Petitioner contends that penalties imposed herein should be abated because he made a good faith effort to change his domicile to Westhampton and a good faith effort comply with the statutory residency requirements. This contention is rejected. "Good faith" does not constitute reasonable cause under the Division's regulations (*see*, 20 NYCRR 2392.1). Moreover, petitioner's claim of good faith is undermined by his City of New York nonresident earnings tax returns filed for each of the years at issue by which he reported that he did not maintain an apartment in New York City during the years at issue. Such returns clearly support the imposition of penalties in this matter.

K. The petition of Joseph Irom is denied and the Notice of Deficiency dated March 25, 2002 is sustained.

DATED: Troy, New York
July 21, 2005

/s/ Timothy J. Alston
ADMINISTRATIVE LAW JUDGE